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Taz Logistics Sdn Bhd v Taz Metals Sdn Bhd & Ors

B HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22NCC-335–10 OF 2015
DARRYL GOON J
27 FEBRUARY 2020

C *Civil Procedure — Damages — Assessment of damages — Court of Appeal allowed plaintiff's claim founded on causes of action of breaches of fiduciary duty, knowing receipt and conspiracy to injure — Court of Appeal ordered for assessment of damages — Appropriate quantum of damages for general, special and exemplary damages*

D

The plaintiff had filed an action against the defendants founded on the causes of action of breaches of fiduciary duty, knowing receipt and conspiracy to injure. The plaintiff's action was dismissed by the High Court, but the Court of Appeal had allowed the plaintiff's appeal. In allowing the appeal, the Court E of Appeal had, inter alia, ordered for damages to be assess by the High Court. The judgment of the Court of Appeal was reported as *Taz Logistics Sdn Bhd v Taz Metals Sdn Bhd & Ors* [2019] 3 MLJ 510. In the present application for assessment of damages, the plaintiff claimed for the following damages: (a) RM450,000 paid by the plaintiff to Orion Base Shipping (M) Sdn Bhd and F the second defendant (this sum was based on the judgment of the Court of Appeal; (b) RM1,003,761 based on the Court of Appeal's order that the business, property and assets of the first defendant, in whatever form and where ever located was constructively held for the benefit of the plaintiff; (c) RM900,000 per month for at least six months being loss of profits (based on G the plaintiff's average net profit for the months of June and July 2015); and (d) exemplary damages against all defendants in the sum of RM2.25m.

Held:

H (1) Having regard to the decision of the Court of Appeal and as the sum of RM450,000 claimed by the plaintiff was not disputed by the defendants, the court allowed the claim (see para 35).

(2) The Court of Appeal had held that, '… the business, property and assets of the 1st Defendant, Taz Metals Sdn Bhd in whatever form and wherever I located is constructively held for the benefit of the plaintiff, Taz Logistics Sdn Bhd'. Therefore, the property, plant and equipment of the first defendant held as at 31 March 2016, were therefore all held constructively for the benefit of the plaintiff. As these property, plant and equipment were written off and given a value of RM1,003,761, and there

was no indication that they still exist, the court of the view that the plaintiff should be entitled, at the very least, to the value of these items as they were meant to be held for the benefit of the plaintiff (see paras 38–39 & 41).

(3) It would not be unjust to hold that a fair assessment of profit would be an average of the net profits of the plaintiff for the months of June and July 2016. Those were the months where the profits made showed some consistency. As such, the court accepted the figure of RM900,000 loss of profits per month submitted by the plaintiff. However, there was no evidence of any mitigation by the plaintiff. It was not disputed that in January 2016, a moratorium on bauxite mining was imposed by the Government. This would have had an impact on the plaintiff's performance. As the wrongs were alleged to have been committed after August 2015, the claim for loss of profits of RM900,000 was allowed for the months in September 2015 to December 2015 amounting to RM3.6m, taking into account the moratorium on bauxite mining in January 2016 (see paras 47–48, 51 & 56).

(4) The assessment of the quantum of exemplary damages would depend on the circumstances and factual matrix of the case. The quantum of exemplary damages to be awarded must be principled and proportionate — the primary objective being to punish and to deter the wrongdoers. Exemplary damages were not meant to be compensatory in nature but punitive. Based on the principles set out above and the circumstances of this case including the price paid by the plaintiff for the shares and the profits earned before the wrongs were committed, the court was of the view that RM900,000 was sufficient as exemplary damages (see paras 57–58 & 67–68).

[Bahasa Malaysia summary

Plaintif telah memfailkan tuntutan terhadap defendan-defendan yang didasarkan pada kausa-kausa tindakan pelanggaran tugas fidusiari, mengetahui penerimaan dan konspirasi untuk mencederakan. Tindakan plaintif ditolak oleh Mahkamah Tinggi, tetapi Mahkamah Rayuan telah membenarkan rayuan plaintif. Dalam membenarkan rayuan tersebut, Mahkamah Rayuan, antara lain, memerintahkan agar ganti rugi dinilai oleh Mahkamah Tinggi. Keputusan Mahkamah Rayuan dilaporkan sebagai *Taz Logistics Sdn Bhd v Taz Metals Sdn Bhd & Ors* [2019] 3 MLJ 510. Dalam permohonan untuk penilaian ganti rugi, plaintif menuntut ganti rugi berikut: (a) RM450,000 yang dibayar oleh plaintif kepada Orion Base Shipping (M) Sdn Bhd dan defendan kedua (jumlah ini berdasarkan keputusan Mahkamah Rayuan); (b) RM1,003,761 berdasarkan perintah Mahkamah Rayuan bahawa perniagaan, harta dan aset defendan pertama, dalam apa jua bentuk dan di mana sahaja berada dipegang secara konstruktif untuk kepentingan plaintif; (c) RM900,000 sebulan untuk sekurang-kurangnya enam bulan kehilangan

keuntungan (berdasarkan purata keuntungan bersih plaintif untuk bulan Jun dan Julai 2015); dan (d) ganti rugi teladan terhadap semua defendan berjumlah RM2.25m.

Diputuskan:

(1) Berpandukan keputusan Mahkamah Rayuan dan memandangkan jumlah RM450,000 yang dituntut oleh plaintif tidak dipertikaikan oleh defendan-defendan, mahkamah membenarkan tuntutan tersebut (lihat perenggan 35).

(2) Mahkamah Rayuan telah memutuskan bahawa, '... the business, property and assets of the 1st Defendant, Taz Metals Sdn Bhd in whatever form and wherever located is constructively held for the benefit of the plaintiff, Taz Logistics Sdn Bhd'. Oleh itu, harta tanah, loji dan peralatan defendan pertama yang dipegang setakat 31 Mac 2016, semuanya dipegang secara konstruktif untuk kepentingan plaintif. Oleh kerana harta tanah, loji dan peralatan ini dihapus dan diberi nilai RM1,003,761, dan tidak ada petunjuk bahawa ia masih wujud, mahkamah berpendapat bahawa plantif berhak, sekurang-kurangnya, atas nilai barang-barang ini kerana barang-barang tersebut sememangnya dipegang untuk kepentingan plaintif (lihat perenggan 38–39 & 41).

(3) Adalah adil untuk menilai bahawa penilaian keuntungan yang adil adalah purata keuntungan bersih plaintif untuk bulan Jun dan Julai 2016. Bulan-bulan tersebut adalah bulan-bulan di mana keuntungan yang diperoleh konsisten. Oleh yang demikian, mahkamah menerima angka kerugian keuntungan RM900,000 setiap bulan yang dikemukakan oleh plaintif. Namun, tiada keterangan mitigasi oleh plaintif. Tidak dipertikaikan bahawa pada Januari 2016, moratorium perlombongan bauksit telah dikuatkuasakan oleh Kerajaan. Ini akan memberi kesan kepada prestasi plaintif. Oleh kerana kesalahan tersebut didakwa dilakukan selepas Ogos 2015, tuntutan kerugian keuntungan sebanyak RM900,000 dibenarkan untuk bulan September 2015 hingga Disember 2015 berjumlah RM3.6 juta, dengan mengambil kira moratorium perlombongan bauksit pada bulan Januari 2016 (lihat perenggan 47–48, 51 & 56).

(4) Penilaian mengenai jumlah ganti rugi teladan akan bergantung pada keadaan dan matriks fakta kes. Jumlah ganti rugi teladan yang harus diberikan mestilah berprinsip dan berkadar - objektif utama adalah menghukum dan mencegah orang yang melakukan kesalahan. Ganti rugi teladan tidak bermaksud untuk mengganti tetapi bersifat menghukum. Berdasarkan prinsip-prinsip yang dinyatakan di atas dan keadaan kes ini termasuk harga yang dibayar oleh plaintif untuk saham dan keuntungan yang diperoleh sebelum kesalahan dilakukan, mahkamah berpendapat bahawa RM900,000 mencukupi sebagai ganti

rugi teladan (lihat perenggan 57–58 & 67–68).]

Cases referred to

AXA Insurance UK plc v Financial Claims Solutions Ltd and others [2018] EWCA Civ 1330, CA (refd)
Ramzan v Brookwide Ltd [2012] 1 All ER 903, CA (refd)
Rookes v Barnard [1964] AC 1129, HL (refd)
Thompson v Commissioner of Police of the Metropolis [1997] 3 WLR 403, CA (refd)

R Jayasingam (Ng Keng Yang with him) (BH Lawrence & Co) for the plaintiff.
Owee Chia Ming (Saw Wei Siang with her) (Ranjit Singh & Yeoh) for the defendants.

Darryl Goon J:

[1] This judgment is in respect of the assessment of the damages suffered by the plaintiff that was ordered by the Court of Appeal.

[2] The plaintiff commenced this action against the defendants founded on causes of action which included breaches of fiduciary duty, knowing receipt and conspiracy to injure.

[3] The plaintiff's claim was dismissed at first instance. However, the plaintiff's appeal to the Court of Appeal was allowed. In allowing the plaintiff's appeal, the Court of Appeal on the 23 October 2018 made, inter alia, the following orders namely:

(i) '... that the business, property and assets of the first defendant, Taz Metals Sdn Bhd in whatever form and wherever located is constructively held for the benefit of the plaintiff, Taz Logistics Sdn Bhd';

(ii) 'Damages are awarded against the defendants and the same are to be assessed by the learned Judge as soon as is reasonably practicable';

(iii) 'Exemplary damages to be assessed and awarded together with general damages ...' in (ii) above; and

(iv) 'An account of any and all profits received by the defendants as a consequence of this conspiracy and breach of directors' duties'.

Also provided in the Court of Appeal's decision was an order for costs and liberty to apply.

[4] In respect of the damages awarded, based on the grounds of judgment of

A the Court of Appeal, they were in the form of general and special damages and exemplary damages.

[5] Directions were given for the assessment of damages and the assessment was based on affidavit evidence tendered by the parties.

B

[6] The following were the affidavits filed by the parties:

(a) the plaintiff's affidavit in support affirmed on 19 November 2018 (encl 165);

C

(b) the plaintiff's affidavit in support (2) affirmed 31 July 2019 (encl 176);

(c) the defendants' affidavit affirmed on 22 August 2019 (encl 182) and

(d) the plaintiff's affidavit in reply (3) affirmed on 5 September 2019 (encl 184).

D

BACKGROUND

[7] The background facts provided below are based on the findings of the E Court of Appeal and they are reproduced for the purposes of context and basis for the damages claimed.

[8] The plaintiff was incorporated on 4 December 2014 and, at the material time, carried on a stevedoring business and was said to be poised to F becoming a full-service logistics centre.

[9] The plaintiff became a subsidiary of a company known as Asdion Bhd ('Asdion') when Asdion bought over 51% of the shares in the plaintiff from the fifth defendant for a sum of RM6m pursuant to a share sale agreement dated G 30 January 2015 ('share sale agreement'). The fourth and fifth defendants, who were shareholders of the plaintiff, continued to hold 49% of its equity.

[10] Under the share sale agreement, it was provided among other terms and H conditions that:

(a) Asdion was to provide capital support and the required heavy equipment; and

(b) the second defendant and the fifth defendant undertook the I responsibility of ensuring that the requisite licences and agreements were procured by the plaintiff.

[11] At the time of the share sale agreement, the plaintiff's net assets were approximately RM100,000, comprising largely of trade and sundry debtors. It

had no fixed assets. The plaintiff was dependent on Asdion to provide the necessary financing for its stevedoring business. A

[12] The plaintiff commenced business profitably but not long thereafter the profitability and business ability of the plaintiff were found to have been deliberately and 'systematically' destroyed by the defendants in a series of events. B

[13] The series of events were essentially steps taken to preclude the plaintiff from securing essential requirements for its business, such as land space, and the diverting of the plaintiff's assets, employees and potential business to the first defendant. C

[14] Th first defendant was a RM2 company with two shares which were held one each by the second and the third defendants. The first defendant was incorporated around 10 February 2015, which was shortly after the share sale agreement. D

[15] As soon as the plaintiff's assets, business opportunities and employees were diverted to the first defendant, the fourth and the fifth defendants resigned as directors of the plaintiff. E

[16] In the grounds of judgment of the Court of Appeal it was held that what was clearly established were: F

(a) breaches of fiduciary duty owed to the plaintiff by the fourth and fifth defendants; and

(b) a deliberate and concerted plan effected to divert the plaintiff's business to the first defendant. G

[17] It was also found that prior to August 2015, the plaintiff was nurtured as a profitable company. However, after August 2015, the Court of Appeal found that the plaintiff '... was essentially deliberately 'disassembled', with a view to diverting the business to ...' the first defendant. H

[18] Two of the plaintiff's customers Citra Offshore Maritime Sdn Bhd and Citra Saran Sdn Bhd were found to have been diverted to the first defendant.

[19] From the judgment of the Court of Appeal, the fifth defendant played the major role in the whole episode. Of the fourth defendant it was held that 'The fact that Tunku Jawahir did not actively participate in the same does not exonerate her, as by her silence she was complicit in this transplanting of the employees and management of Taz Logistics to Taz Metals'. I

[20] Based on a series of events identified by the Court of Appeal, it was held that 'The clear inference that emanates from this series of events is that as early as June 2015, Dato' Ridzuan had already contemplated and was putting into effect a plan to transfer or transplant the second yard from Taz Logistics to Taz Metals, at the expense of Taz Logistics. In relation to this and of the fourth defendant, the Court of Appeal maintained that she, '... knew or ought to have known or at the very least refused to approve or be complicit in this appropriation of the assets of Taz Logistics in favour of Taz Metals'.

[21] The Court of Appeal also held that:

> [82] Taken as a whole, this series of events clearly establishes not only breaches of fiduciary duty as directors by both Dato Ridzuan and Tunku Jawahir, but also that the defendants as a whole had acted in concert to divert the yard space in favour of Taz Metals. The roles played by Tunku Jawahir, Tengku Azlan and Tengku Aslahuddin may not on the face of it appear to be prominent, in comparison to Dato' Ridzuan, but it must be borne in mind that as the directors and shareholders of Taz Metals, it cannot simply be concluded that Tengku Azlan and Tengku Aslahuddin had absolutely no knowledge or had not been complicit.

DAMAGES SOUGHT BY PLAINTIFF

[22] At the hearing of the assessment, based on the written submissions made and the oral submissions of learned counsel for the plaintiff, the plaintiff's claim for damages consisted of the following:

(a) RM450,000 paid by the plaintiff to Orion Base Shipping (M) Sdn Bhd and the second defendant;

(b) RM1,003,761 based on the Court of Appeal's order that the business, property and assets of the first defendant, in whatever form and where ever located is constructively held for the benefit of the plaintiff;

(c) RM900,000 per month for *at least* six months being loss of profits; and

(d) exemplary damages against all defendants in the sum of RM2.25m.

[23] As regards the RM450,000 claimed, the plaintiff referred to the judgment of the Court of Appeal wherein it was found that the plaintiff had suffered a clear loss of that amount when that sum was paid out to Orion and the second defendant.

[24] As for the sum of RM1,003,761, it was based on the order of the Court of Appeal that the business, property and assets of the first defendant in whatever form and wherever located is constructively held for the benefit of the plaintiff. The amount was derived from the first defendant's financial

statements for the financial year ended 31 March 2016 in which it was stated that the property, plant and equipment of the first defendant written off as at 31 March 2016 was RM1,003,761

[25] As for the claim for RM900,000 per month for at least six months, amounting to RM5.4m, that was a claim for loss of profits. The amount of RM900,000 was based on the average net profit of the plaintiff for the months of June and July 2015 which was RM912,439.50. This average net profit was then rounded down to achieve the amount of RM900,000.

[26] The Court of Appeal found that, 'After August 2015 however, Taz Logistics was essentially deliberately 'disassembled' ...'. However, manifestations of the wrongs committed had occurred in August 2015. For example, Dato' Wan, the plaintiff's pivotal management employee, tendered his resignation on 1 August 2015. The conspiracy that was found proven by the Court of Appeal had already been hatched. Reliance was therefore placed by the plaintiff on its performance prior to that ie in the months preceding August 2015.

[27] It was contended that the plaintiff was entitled to loss of this amount of RM900,000 for at least six months because it would have taken at least six months for the plaintiff to recover from the damage caused.

[28] In respect of exemplary damages, the plaintiff sought a sum of RM2.25m in respect of all the defendants. This was thought appropriate by the plaintiff in light of the circumstances.

THE DEFENDANTS' CONTENTIONS

[29] Learned counsel for the defendants conceded that the amount claimed of RM450,000 was agreed as recoverable by the Court of Appeal. Accordingly, no objection was taken against this claim.

[30] As for the sum of RM1,003,761, the defendants maintained that there were no properties identified as being held in trust for the plaintiff. The sum of RM1,003,761 represented what had been written off in terms of property, plant and equipment and is found in the financial statements of the first defendant for the financial year ended 2016.

[31] In respect of the claim for loss of profits, the defendants' first contention was that the plaintiff's loss was not proved and cannot be based on the profits of the two months preceding August 2015. This was because there were so many imponderables and whether the plaintiff would have made any profits was not established.

[32] In addition, it was contended that the business activity and revenue of the plaintiff and the first defendant depended on the sustainability of the bauxite mining industry. However, in early 2016, a moratorium was imposed on the mining and export of bauxite by the authorities. That moratorium was only lifted in the second quarter of 2019. Therefore, after January 2016, the plaintiff would not have made any profits.

[33] The first defendant it was said ceased its entire business operation in its financial year ending 2016 and it never resumed business. It remained dormant ever since. It also made a loss of RM627,261 for its financial year ending 2016. It was deposed that none of the defendants were paid by the first defendant for services rendered and/or money that they had advanced.

[34] As for exemplary damages, the defendants suggested a sum of RM80,000 to RM100,000 for all defendants.

THE PLAINTIFF'S CLAIM FOR RM450,000

[35] Having regard to the decision of the Court of Appeal and as this sum of RM450,000 claimed was not disputed by the defendants, it should accordingly be allowed.

THE PLAINTIFF'S CLAIM FOR RM1,003,761

[36] The amount of RM1,003,761 was based on the first defendant's financial statements for the financial year ended 31 March 2016. The financial statements disclosed that the property, plant and equipment of the first defendant written off as at 31 March 2016 was RM1,003,761.

[37] As the defendants quite rightly pointed out, this was the total sum written off in respect of the first defendant's property, plant and equipment. They therefore cannot be said to be the '... business, property and assets of the first defendant, Taz Metals Sdn Bhd in whatever form and wherever located ...' as such and as ordered by the Court of Appeal.

[38] On the other hand, by its order, the Court of Appeal had held that, '... the business, property and assets of the first defendant, Taz Metals Sdn Bhd in whatever form and wherever located is constructively held for the benefit of the plaintiff, Taz Logistics Sdn Bhd'.

[39] In my view, this clearly means whatever assets the first defendant had, are to be regarded as being held by the first defendant constructively for the

benefit of the plaintiff. The property, plant and equipment of the first defendant held as at 31 March 2016, were therefore all held for the benefit of the plaintiff.

[40] There was however no evidence that any of these property, plant and equipment were still in the possession of the first defendant. The first defendant was said to have ceased its entire business and had been dormant since 2016.

[41] As these property, plant and equipment were written off and given a value of RM1,003,761, and there was no indication that they still exist, I am of the view that the plaintiff should be entitled, at the very least, to the value of these items as they were meant to be held for the benefit of the plaintiff. That is what the plaintiff has lost.

THE PLAINTIFF'S CLAIM FOR LOSS OF PROFITS

[42] The plaintiff's claim for general damages was primarily made up of the loss of the profits that it would have made. The amount of RM900,000 per month was a figure derived from the average of the plaintiff's net profits for the months of June and July 2015. The average net profit for those two months was in fact RM912,439.50 but was rounded down to RM900,000.

[43] The plaintiff maintained that it would have taken at least six months for the plaintiff to recover from what was done to its business by the defendants. This would mean that the total damages for loss of profit would amount to RM5.4m.

[44] The majority of the plaintiff's shares were acquired by Asdion by the share sale agreement of 30 January 2015. As mentioned, Asdion was required for its ability to provide financial support for the business. Asdion's financial support would have been injected into the plaintiff thereafter, from February 2015 onwards.

[45] Based on data that was available, the plaintiff's financial performance from February 2015 to July 2015 was as follows:

Month	Net Profit
February	RM198,268
March	RM674,980
April	(224,898)
May	RM64,670
June	RM967,187
July	RM857,692

A **[46]** The May 2015 profits seemed unusually low, perhaps it followed from the large loss in April. These were the earlier part of Asdion's involvement. However, after the initial months, the plaintiff started to make somewhat more consistent profits from June to July of 2015, based on such data as were available. The probability was that it would have continued to make profits save
B for any unexpected intervening event.

[47] While what actual profits the plaintiff would have made would never be known, it would not be unjust to hold that a fair assessment would be an average of the net profits of the plaintiff for the months of June and July 2016.
C Those were the months where the profits made showed some consistency. As such I accept the figure of RM900,000 loss of profits per month submitted by the plaintiff.

D **[48]** It is however observed that there was no evidence of any mitigation by the plaintiff. On the other hand, the plaintiff was left very much in destitute by the wrongs done. It was somewhat incapacitated to be able to act with any degree of alacrity to mitigate its losses. By the wrongs of the defendants it had lost its key personnel and staff. The plaintiff had also lost its customers.

E

[49] In the words of Nalini Pathmanathan JCA who delivered the judgment of the Court of Appeal:

(a) the plaintiff, '... was essentially deliberately 'disassembled', with a view
F to diverting the business to Taz Metals';

(b) the plaintiff, '... was left completely paralysed and cannibalised ...', and

(c) the defendants, '... had acted deliberately to 'steal' or 'appropriate' the business of Taz Logistics and transplanted it to Taz Metals'.

G

[50] However, it was not disputed that in January 2016, a moratorium on bauxite mining was imposed by the government. This would have had an impact on the plaintiff's performance.

H

[51] Asdion's 'Board Paper' for its proposed acquisition of 51% of the plaintiff at the time, projected that there would be an increase in exports of bauxite to China following a ban of bauxite exports by Indonesia. It was also observed that, 'Taz, which began its operations by providing stevedoring
I services primarily to bauxite exporters, is well positioned to ride on this phenomenon'.

[52] In addition, Asdion's Annual Reports of 2017 and 2018 stated that the Groups' drop in revenue was mainly due to the '... drop of stevedoring related activities in Kuantan Port ... caused by the implementation of the moratorium on mining of commodity'.

[53] It was quite clear that the plaintiff's primary source of revenue was linked to the mining of bauxite. With the moratorium on bauxite mining, the plaintiff's income would have been reduced substantially from January 2016 onwards to 2019.

[54] There was however, no evidence of what other source of income the plaintiff had, to displace the contention that it would practically have no revenue because of the moratorium.

[55] If bauxite mining related business was not a main source of its income, there was no reason why it could not employ new personnel and continue with the business.

[56] As the wrongs were alleged to have been committed after August 2015, the claim for loss of profits of RM900,000 per month would be allowed for the months in September 2015 to December 2015, ie loss of profits of RM900,000 for four months amounting to a total of RM3.6m, taking into account the moratorium on bauxite mining in January 2016. The moratorium was only lifted almost two and a half years later in the second quarter of 2019. By then, the plaintiff would have had to have mitigated its loss and damage.

EXEMPLARY DAMAGES

[57] As for exemplary damages, based on the authorities, although there are principles which would guide a court in the assessment of the quantum of exemplary damages, there are no hard and fast rules. Much would depend on the circumstances and factual matrix of the case.

[58] It is clear that the quantum of exemplary damages to be awarded must be principled and proportionate — the primary objective being to punish and to deter the wrongdoers (see *Ramzan v Brookwide Ltd* [2012] 1 All ER 903; *AXA Insurance UK plc v Financial Claims Solutions Ltd and others* [2018] EWCA Civ 1330 (CA)). This is of course unlike compensatory damages.

[59] One of the three categories of cases where exemplary damages may be awarded is where, 'the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff' (see Lord Devlin, *Rookes v Barnard* [1964] AC 1129 at p 1226). As Lord Devlin explained in *Rookes v Barnard* at p 1227:

> This category is not confined to moneymaking in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object — perhaps some property which he covets — which either he could not obtain at all or not obtain except at a price greater than he wants to put down. Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay.

Thus, this category is not confined to moneymaking, and it clearly includes it.

[60] In the present case, the nature of the wrongs on the part of the defendants falls squarely in the category described by Lord Devlin above. It involved what may be said to be the transplantation of the plaintiff's business to the first defendant, 'lock, stock and barrel' as it were, including the staff. The defendants had clearly sought to profit from their wrong. The graphic descriptions given of what was done described by Nalini Pathmanathan JCA comes to mind and it manifested the court's abhorrence at what was done to the extent that exemplary damages were ordered. As the judgment of the Court of Appeal indicated, 'The award of such damages signifies disapproval, condemnation or denunciation of the defendants' acts against Taz Logistics'.

[61] The defendants must be taken to intend the consequences of their wrongs. The effect, and thus presumed intent of their wrongs, would be that whatever income the plaintiff would have generated would instead be generated by the first defendant. Thus, the calculated benefit would in all probability have been the income that the plaintiff would have generated from its business.

[62] In relation to the income that the plaintiff generated for June and July 2015, the plaintiff managed to produce an average profit of about RM900,000. What profit the first defendant would have generated would probably be similar, considering that it was essentially a takeover of the plaintiff's business assets and manpower.

[63] However, after the fourth and fifth defendants resigned as directors of the plaintiff, there was nothing to stop the defendants from persuading the plaintiff's customers and staff to switch over to the first defendant, without committing any wrong. Had this been done, it could reasonably have taken a couple of months after the first defendant had been set up and all direct links severed from the plaintiff. Thus, the first defendant would have received the unlawful benefit for about two months. Taking that benefit to be at RM900,000 per month, ie the average profit that the plaintiff would have made per month as mention above, this would amount to RM1.8m.

[64] In this case, the plaintiff would have been compensated with its loss of profits in the general damages awarded. This should be taken into account when considering exemplary damages, which, although not compensatory, has also been described as a 'windfall'. In *Thompson v Commissioner of Police of the Metropolis* [1997] 3 WLR 403 at p 418, Lord Woolf stated:

> In deciding upon what should be treated as the upper limits for exemplary damages we have selected a figure which is sufficiently substantial to make it clear that there has been conduct of a nature which warrants serious civil punishment and indicates the jury's vigorous disapproval of what has occurred but at the same time recognises that the plaintiff is the *recipient of a windfall* in relation to exemplary damages. *As punishment is the primary objective in this class of case it is more difficult to tie the amount of exemplary damages to the award of compensatory damages, including aggravated. However in many cases it could prove a useful check subject to the upper limits we have identified if it is accepted that it will be unusual for the exemplary damages to produce a result of more than three times the basic damages being awarded* (as the total of the basic aggravated and exemplary damages) except again where the basic damages are. (Emphasis added.)

[65] Clearly therefore, it can be seen that some reference to the compensatory damages awarded would be necessary to check the amount of exemplary damages to be awarded.

[66] In addition, in *Ramzan v Brookwide,* at p 929, Arden LJ stated that:

> [82] *There is little guidance on the quantification of exemplary damages but clearly the sum must be principled and proportionate*. In the light of the judge's unchallenged findings that some award of exemplary damages is necessary in order to deter Brookwide from similar conduct elsewhere, the principled basis is that of making a punitive award. *Contrary to the submissions of Mr Anderson, this does not need to be a substantial sum to make its point. It is exceptional for a court to make an award of exemplary damages and, accordingly, the fact of making the award should largely be in itself sufficient*. (Emphasis added.)

[67] Exemplary damages are not meant to be compensatory in nature but punitive. As Lord Devlin explained, it is awarded, where compensation is inadequate, '... to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then it can award some larger sum'.

[68] Having regard to the principles set out above and the circumstances of this case including the price paid by the plaintiff for the shares and the profits earned before the wrongs were committed, I would impose exemplary damages on the defendants of a sum of RM900,000 instead of the RM1.8m. In my view, RM900,000 would be sufficient as exemplary damages in this case.

CONCLUSION

[69] In conclusion, by reason of the foregoing, the total damages awarded against the defendants is a sum of RM5,953,761 made up as follows:

(a) compensatory damages consisting of:

(i) RM450,000 being the payment to Orion Base Shipping (M) Sdn Bhd and which claim was not disputed;

(ii) RM1,003,761 being value of properties belonging to the plaintiff determined by the Court of Appeal to be held on trust for the plaintiff;

(iii) RM3.6m, being loss of profit, and

(b) Exemplary damages in the sum of RM900,000.

[70] Interest on the damages awarded is ordered at the rate of 5%pa until the date of full payment.

Order accordingly.

Reported by Dzulqarnain bin Ab Fatar